IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31684

STATE OF IDAHO,	)	
	)	**2006 Opinion No. 15**
Plaintiff-Appellant,	)	
	)	**Filed: February 13, 2006**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
JON J. LEWIS,	)	
	)	
Defendant-Respondent.	)	
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Order granting motion to suppress, reversed. Case remanded.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K,. Jorgensen, Deputy Attorney General, Boise, for appellant. Kenneth K. Jorgensen argued.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for respondent. Eric D. Fredericksen argued.

PERRY, Chief Judge

The state appeals from the district court's order granting Jon J. Lewis's motion to suppress statements he made to an officer. For the reasons set forth below, we reverse.

I.
FACTS AND PROCEDURE

An officer observed a vehicle with its license plate obscured from view. The officer initiated a traffic stop and made contact with the driver, Lewis, and his two passengers. The officer discovered an outstanding warrant for Lewis and placed him under arrest. The officer asked the two passengers to exit the vehicle and searched it incident to Lewis's arrest. The officer discovered methamphetamine under the seat where one of the passenger's feet had been located. After Lewis was transported to jail, he allegedly waived his right to remain silent and admitted that the methamphetamine belonged to him. Lewis was charged with possession of a controlled substance. I.C. § 37-2732(c)(1).

The officer made audio recordings of the traffic stop and Lewis's interrogation at the jail. Lewis requested that those recordings be disclosed. However, the officer's attempt to save the recordings onto a computer failed, and he was unable to retrieve them. Lewis filed a motion to suppress alleging that permitting the state to use Lewis's statements, which the officer had recorded and lost, would violate his right to due process of law. The district court granted Lewis's motion. The state appeals.

II.
ANALYSIS

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *State v. Ward*, 135 Idaho 68, 72, 14 P.3d 388, 392 (Ct. App. 2000). Consequently, the prosecution's failure to disclose evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence favorable to the accused includes evidence that, if disclosed and used effectively, may make the difference between conviction and acquittal. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *State v. Avelar*, 124 Idaho 317, 321, 859 P.2d 353, 357 (Ct. App. 1993). Both exculpatory evidence and impeachment evidence are considered evidence favorable to the accused. *Bagley*, 473 U.S. at 676; *Avelar*, 124 Idaho at 321, 859 P.2d at 357.

Similarly, the prosecution is required to preserve material evidence. *United States v. Booth*, 309 F.3d 566, 574 (9th Cir. 2002); *State v. Dopp*, 129 Idaho 597, 606, 930 P.2d 1039, 1048 (Ct. App. 1996). To meet the standard of materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available

means. *Trombetta,* 467 U.S. at 489; *Booth*, 309 F.3d at 574. However, failure to preserve potentially useful evidence does not constitute a denial of due process of law unless the defendant can show bad faith on the part of the police. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)*; Stuart v. State,* 127 Idaho 806, 815, 907 P.2d 783, 792 (1995); *State v. Casselman,* 141 Idaho 592, 595, 114 P.34d 150, 153 (Ct. App. 2005).

A. Value of the Recording

The state asserts that, because Lewis failed to offer any evidence demonstrating that the recordings contained exculpatory evidence, he failed to place the exculpatory value of the recordings at issue. The state urges that the only evidence before the district court regarding the nature of the recordings was the officer's testimony that Lewis made incriminating statements.[1] The state argues that, because it had no duty to preserve inculpatory evidence, Lewis's right to due process was not violated when the recordings were lost. Lewis contends that he placed the content of the recordings at issue by pleading not guilty and by filing a motion to suppress challenging the alleged confession.

At the suppression hearing, the officer testified as to the identity and location of the vehicle's occupants. The officer also indicated that he discovered the arrest warrant for Lewis and searched the vehicle incident to his arrest. However, the officer neither testified about finding the methamphetamine nor about any statements made by the vehicle's occupants. Instead, the officer's testimony focused on police procedure for making and preserving audio recordings. After the officer indicated that he recorded an interview with Lewis subsequent to transporting him to jail, the following exchange occurred:

> [Counsel]: And it was during the course of that conversation that he allegedly made some incriminating statements; is that correct?
> [Officer]: Correct.

The officer's general conclusion that Lewis made incriminating statements, unsupported by any underlying facts, did not establish that the recording only contained evidence of an inculpatory nature. Further, for purposes of *Brady,* there is no difference between exculpatory and impeachment evidence. *Kyles v. Whitley,* 514 U.S. 419, 433 (1995). Both kinds of evidence

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[1] The state also cites to the officer's affidavit in support of the criminal complaint as evidence that the recordings contained incriminating information. However, it does not appear from the record that the officer's affidavit was admitted into evidence at the suppression hearing.

are favorable to the accused, which the state has a duty to disclose. *See Bagley*, 473 U.S. at 676; *Avelar*, 124 Idaho at 321, 859 P.2d at 357. Even if the recordings in this case contained no evidence of an exculpatory nature, they might have contained impeachment evidence. We therefore reject the state's assertion that it had no duty to preserve the recordings.

Lewis asserts that the exculpatory nature of the recording of his interrogation at the jail was immediately apparent because it would have revealed whether his confession was taken in violation of his rights under *Miranda*.[2] Lewis contends that the recording might contain evidence leading to the suppression of his confession and, thus, was evidence that he could utilize to prove his innocence. Lewis argues that, therefore, the district court correctly concluded that his right to due process had been violated. However, evidence that could be introduced at a suppression hearing and that might result in the exclusion of incriminating evidence is not exculpatory because the successful suppression of incriminating evidence is unrelated to the actual culpability of an accused. *United States v. Barton*, 995 F.2d 931, 934 (9th Cir. 1993).

Nevertheless, the principles announced in *Brady* and its progeny apply in a suppression hearing. *Barton*, 995 F.2d at 935. In *Barton*, the defendant challenged the government's destruction of marijuana plants found in his home because he could have utilized those plants to challenge the truthfulness of statements made in an affidavit supporting a search warrant. The Ninth Circuit Court of Appeals reasoned that, if an officer was to deliberately destroy impeaching evidence, the officer could then feel secure that false allegations would not be challenged. *Id.* at 935. Such a result would effectively deprive a criminal defendant of his or her Fourth Amendment right to challenge the validity of a search warrant. *Id.* Therefore, the due process principles announced in *Brady* and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for search warrant. *Id.* However, the defendant's right to due process was not violated because he had failed to demonstrate that the destruction of the marijuana plants was in bad faith as required by *Youngblood*. *Barton*, 995 F.2d at 936.

Similarly, in this case, if the officer had deliberately destroyed evidence demonstrating he failed to adequately protect Lewis's rights under *Miranda*, he could feel safe that the failure to secure a proper confession would go unchallenged. Therefore, we conclude that the state's

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[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

requirement to preserve evidence applies to evidence that would be helpful to a defendant in a suppression hearing.

However, we disagree with Lewis's contention that the interrogation recording's beneficial value was immediately apparent. Evidence lacks apparent exculpatory value when analysis of that evidence would have simply offered an avenue of investigation that might have led any number of directions. *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004). In *Youngblood*, the defendant claimed that police failure to properly preserve and test a semen sample violated his right to due process. The Court noted that, although good faith is irrelevant where the state fails to disclose material exculpatory evidence, due process requires a different result where all that could be said is that the evidence could have been subjected to tests, the results of which might have exonerated the defendant. *Youngblood*, 488 U.S. at 57. Thus, because there was no suggestion of bad faith on the part of the police when they failed to preserve the semen sample, no due process violation occurred. *Id.* at 58.

Lewis did not present any evidence from which the district court could have found that the officer failed to adequately protect his rights under *Miranda*. Instead, Lewis alleges that the recordings might have demonstrated that his *Miranda* waiver was invalid. Thus, because Lewis only contends that the recordings would have offered an avenue of investigation, which might have resulted in the suppression of incriminating evidence, the contents of the recording were potentially useful. As in *Barton*, Lewis was required to demonstrate that the officer lost the recordings in bad faith in order to establish that his right to due process had been violated.

B. Bad Faith Requirement

The district court recognized that the recordings were potentially exculpatory and, thus, that the holding in *Youngblood* dictated that Lewis was required to demonstrate the officer lost the recordings in bad faith in order to establish a due process violation. The district court also noted that nothing in the record demonstrated that the officer acted in bad faith when he tried, but failed, to preserve the recordings. Nevertheless, the district court noted that the "unique circumstances of the case at bar demonstrate that the officer's compliance or non-compliance with normal practices will play such a considerable role in the outcome that to overlook it would lead to an unjust result." Relying on the United States Supreme Court's decision in *Trombetta*, the district court concluded that its consideration of whether police acted in bad faith was

secondary to its consideration of the exculpatory value of the evidence and the existence of other evidence that was comparable and reasonably obtainable.

Trombetta, decided four years before *Youngblood*, addressed whether officers who conducted breath analysis on suspected intoxicated drivers were required to preserve breath samples for use by the defense. In concluding that the Constitution had not been violated, the Court noted that the destruction of the breath samples was in good faith and in accordance with normal practice. *Trombetta*, 467 U.S. at 488. The Court also indicated that, "more importantly, [the state's] policy of not preserving breath samples is without constitutional defect." *Id.* The breath samples neither possessed an exculpatory value apparent before they were destroyed nor were of such a nature that the defendants would be unable to obtain comparable evidence by other reasonably available means. *See id.* at 489. The Court held that the state did not have a duty to preserve breath samples. *Id.* at 491.

The district court in this case reasoned that the Court in *Youngblood* did not overrule *Trombetta* and that the *Trombetta* Court indicated the value of the evidence was more important than the officer's good faith. The district court therefore considered the exculpatory value of the recordings and the existence of other comparable and reasonably obtainable evidence in addition to the officer's good faith. However, *Trombetta* speaks of evidence with apparent exculpatory value. *Youngblood*, 488 U.S. at 56, n.*. The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood*, 488 U.S. at 56, n.*; *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993); *Stuart*, 127 Idaho at 816, 907 P.2d at 793. Where police fail to preserve evidence in bad faith, their conduct indicates that the evidence could form a basis for exonerating the defendant. *See Youngblood*, 488 U.S. at 58. Thus, the requirement of bad faith set forth in *Youngblood* dovetails with the first part of the *Trombetta* test--that the exculpatory value of the evidence be apparent before its destruction. *Cooper*, 983 F.2d at 931.

Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and often disputed. *Youngblood*, 488 U.S. at 57-58. Further, the standards of fundamental fairness do not impose an undifferentiated and absolute duty to retain and to preserve all items that might be of conceivable evidentiary significance in a particular prosecution. *Youngblood*, 488 U.S. at 58. Accordingly, requiring a defendant to demonstrate bad faith confines the obligation to preserve

evidence to that class of cases where the interests of justice most clearly require it and limits the obligation to reasonable bounds. *Id.; Stuart*, 127 Idaho at 815, 907 P.2d at 792.

Here, by determining that the issue of bad faith was secondary to the issues of the recordings' value and the existence of alternate evidence, the district court failed to follow the United States Supreme Court's holding that the unintentional failure to preserve evidence of unknown value does not violate due process. Because the value of the recordings was unknown and the officer did not act in bad faith, Lewis's right to due process was not violated.

III.

CONCLUSION

Lewis failed to demonstrate that the officer lost the audio recordings in bad faith. Therefore, the district court erred in granting Lewis's motion to suppress. The district court's order granting Lewis's motion to suppress is hereby reversed, and we remand the case for further proceedings.

Judge GUTIERREZ and Judge Pro Tem BUTLER, **CONCUR.**